

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

On September 16, 2014 appellant, through counsel, requested a hearing before an OWCP hearing representative, which was held by videoconference on February 26, 2015. By decision dated June 3, 2015, an OWCP hearing representative set aside OWCP's September 11, 2014 decision. OWCP was directed to have Dr. William Dinenberg, a Board-certified orthopedic surgeon, acting as OWCP's second opinion physician, address permanent impairment of the lower extremities including preexisting impairments to the scheduled members.

In August 27 and September 7, 2015 reports, Dr. Dinenberg opined that appellant had five percent permanent impairment of the left lower extremity due to L5 motor nerve impairment under The Guides Newsletter, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (The Guides Newsletter)², but no permanent impairment of the right lower extremity. He noted that his examination findings of the lower extremities were supported by the 2014 diagnostic testing which demonstrated a left-sided radiculopathy related to the L5 nerve only. Dr. Dinenberg found no sensory findings on examination and, thus, a left-sided impairment was rated on the L5 motor nerve only. In a January 13, 2016 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA), opined that maximum medical improvement (MMI) was reached August 27, 2016 and that the medical evidence did not support an increased schedule award.

By decision dated July 20, 2016, OWCP issued a *de novo* decision for nine percent permanent impairment of left lower extremity and zero percent permanent impairment of the right lower extremity. It noted that appellant was not entitled to an additional schedule award greater than that awarded on September 11, 2014. On November 15, 2017 appellant, through counsel, requested reconsideration. By decision dated January 30, 2018, OWCP denied modification of its July 20, 2016 decision.

On March 6, 2018 counsel again requested reconsideration. He submitted a copy of a September 22, 2017 electromyogram and nerve conduction velocity (EMG/NCV) study which revealed the existence of bilateral L4 and L5 radiculopathies.

In a June 1, 2018 report, Dr. Morley Slutsky, Board-certified in occupational medicine and serving as DMA, reviewed the latest statement of accepted facts (SOAF) dated July 1, 2015, which noted the acceptance of a lumbosacral radiculopathy, and appellant's medical record, including the September 22, 2017 EMG/NCV testing. He opined that MMI was reached on August 27, 2018.³ The DMA concluded, based on all the medical evidence provided, that appellant had normal lower extremity sensation. Utilizing the findings in Dr. Dinenberg's August 27, 2015 impairment evaluation and *The Guides Newsletter*, the DMA opined that there was no basis for a right lower extremity impairment as there were no right lower extremity sensory or motor deficits related to the lumbar spine. For the left lower extremity, the DMA found that appellant had zero percent impairment due to normal lower extremity sensation and five percent

² For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that The Guides Newsletter is to be applied. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

³ This appears to be a typographical error and should read as August 27, 2015 based on the DMA's review of Dr. Dinenberg's August 27, 2015 report.

left lower extremity impairment based on the mild left L5 weakness Dr. Dinenberg had reported and confirmed by the September 22, 2017 EMG/NCV study. The DMA noted that, as appellant had a prior left lower extremity award of nine percent impairment for the same nerve root, there was not a greater extent of permanent impairment for schedule award purposes.

By decision dated July 2, 2018, OWCP denied modification of its January 30, 2018 decision. The weight of the medical evidence was given to Dr. Slutsky's June 1, 2018 DMA report.

Having reviewed the case record, the Board finds that this case must be remanded to OWCP. Appellant's claim was accepted for a lumbosacral radiculopathy. The September 22, 2017 EMG/NCV test revealed the existence of bilateral L4 and L5 radiculopathies, but in his June 1, 2018 report the DMA only indicated that it confirmed the existence of a left L5 radiculopathy. No mention was made of the bilateral radiculopathies of L4 or the right-sided radiculopathy of L5 and whether such conditions were preexisting or subsequently acquired conditions with respect to the March 29, 2010 employment incident. The Board has long held that only preexisting and not subsequently-acquired conditions are to be included in schedule award determinations.⁴ Furthermore, the DMA performed his impairment opinion based on Dr. Dinenberg's August 27, 2015 impairment evaluation as it was the most recent impairment evaluation of record. However, Dr. Dinenberg's evaluation predated the September 22, 2017 EMG/NCV test. As OWCP did not request clarification from its DMA regarding the extent of appellant's left lower extremity and right lower extremity permanent impairment related to the March 29, 2010 employment injury based on the September 22, 2017 EMG/NCV test, the case must be remanded to OWCP for further development of the medical evidence.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.⁵ It also has an obligation to see that justice is done.⁶ In this case, OWCP failed to properly develop the evidence following the DMA's June 1, 2018 report. As such, the Board will remand the case to OWCP for additional development of appellant's claim for an additional schedule award. Following this and any other further development deemed necessary, OWCP shall issue an appropriate decision on appellant's claim.⁷ Accordingly,

⁴ See *D.G.*, Docket No. 16-1855 (issued August 28, 2017); *Peter C. Belkind*, 56 ECAB 580 (2005).

⁵ See *A.G.*, Docket No. 19-0153 (issued May 13, 2019); *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

⁶ *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *B.C.*, Docket No. 15-1853 (issued January 19, 2016); *William J. Cantrell*, *id.*

⁷ See *A.J.*, Docket No. 18-0727 (issued February 21, 2019); *G.S.*, Docket No. 16-0908 (issued October 26, 2017).

IT IS HEREBY ORDERED THAT the July 2, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this order of the Board.

Issued: September 18, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board